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In the Supreme Court of the United States

OCTOBER TERM, [redacted] 1970

JOHN D. SULLIVAN,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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In the
Supreme Court of the United States

OCTOBER TERM, 1969

NO.

JOHN D. SULLIVAN,

Petitioner,

VS.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

Petitioner prays that a writ of certiorari be issued to review the judgment of the United States Court of Appeals for the Seventh Circuit, entered in this cause on June 13, 1969.

OPINION BELOW

The per curium opinion of the Court of Appeals is as yet unreported, but is reprinted herein as Appendix A, *infra.*

JURISDICTION.

The judgment of the Court of Appeals (Appendix B, *infra*) was entered on June 13, 1969. A timely petition for rehearing was denied on July 7, 1969 (Appendix C, *infra*). This Petition is filed within 30 days of that date. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED.

1. Whether Rule 8(b) of the Federal Rules of Criminal Procedure permits two counts charging two defendants with the sale and the receipt, concealment, sale and facilitation of the transportation, concealment and sale of heroin, both offenses arising out of one sales transaction "from on or about June 14, 1966, to on or about June 22, 1966," to be joined in an indictment and for trial with three other counts charging one of these defendants with offenses growing out of his possession of cocaine, marijuana, hashish and heroin on June 23, 1966?

2. Whether joinder of defendants contrary to Rule 8(b) of the Federal Rules of Criminal Procedure may be considered "harmless?"

3. Assuming that such joinder may be considered harmless, whether it was in the present case where it was shown that the co-defendant, with whom Petitioner was charged in the two counts arising out of the alleged sale, possessed in his home on the day following the alleged sale, quantities of heroin, cocaine, marijuana and hashish, and other narcotics paraphernalia?

4. Whether an affidavit, executed in support of an application for a warrant to search for "money * * * the fruit of a crime," reciting a belief that the money is located on the premises to be searched based on information received from a named informant that he paid the occupant of the premises $1,500 for narcotics nine days earlier and that the occupant was present when the informant paid a third person $3,000 two days earlier, and information from another agent that "he saw the delivery of the narcotics on" the preceding day, sets forth "underlying circumstances" from which the Commissioner could independently judge the validity of the affiant's belief that the money was on the premises to be searched?

5. Whether agents executing a search warrant calling for the seizure of "money, * * * the fruit of a crime" are entitled, either by virtue of the warrant or by virtue of their being in plain sight, to seize index cards containing handwritten numbers and letters from the top of a dresser in Petitioner's apartment?

6. Whether *Katz* v. *United States*, 389 U.S. 347, 88 S.Ct. 507 (1967), prohibits the eavesdropping of conversations where only one party to the conversation has consented thereto?

CONSTITUTIONAL PROVISIONS AND RULES INVOLVED

The Fourth Amendment, Constitution of the United States, provides:

> "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized."

The Fifth Amendment, Constitution of the United States, provides in pertinent part:

> "No person shall be * * * compelled in any criminal case to be a witness against himself * * *".

Rule 8 of the Federal Rules of Criminal Procedure (18 U.S.C.A.) provides:

> "(a) Joinder of Offenses. Two or more offenses may be charged in the same indictment or information

in a separate count for each offense if the offenses charged, whether felonies or misdemeanors or both, are of the same or similar character or are based on the same act or transaction or on two or more acts or transactions connected together or constituting parts of a common scheme or plan.

"(b) Joinder of Defendants. Two or more defendants may be charged in the same indictment or information if they are alleged to have participated in the same act or transaction or in the same series of acts or transactions constituting an offense or offenses. Such defendants may be charged in one or more counts together or separately and all of the defendants need not be charged in each count."

Rule 14 of the Federal Rules of Criminal Procedure (18 U.S.C.A.) provides in pertinent part:

"If it appears that a defendant * * * is prejudiced by a joinder of offenses or of defendants in an indictment * * * or by such joinder for trial together, the Court may order an election or separate trial of counts, grant a severance of defendants, or provide whatever other relief justice requires."

Rule 52(a) of the Federal Rules of Criminal Procedure (18 U.S.C.A.) provides:

"(a) Harmless Error. Any error, defect, irregularity or variance which does not affect substantial rights shall be disregarded."

STATEMENT.

Petitioner John D. Sullivan was jointly indicted with Sheldon Teller[1] by the United States Grand Jury. The five-count indictment charged substantive violations of

[1] Teller, a co-appellant below, has filed a separate Petition for Certiorari.

several narcotics laws. Petitioner and Teller were both named in Counts I and II, each of which grew out of the alleged sale of heroin to one Samuel Washington on July 22, 1966.

Count I charged that from on or about July 14, 1966, to on or about July 22, 1966, the two defendants sold, bartered, exchanged and gave away approximately 151.150 grams of heroin to Washington not in pursuance of a written order, in violation of Section 4705(a), Title 26, United States Code.[2] Count II charged that on the same dates the two defendants received, concealed, sold and facilitated the transportation, concealment and sale of the heroin after it had been brought into the United States contrary to law, knowing it had been illegally imported, in violation of Section 174, Title 21, United States Code.[3]

Counts III, IV and V were concerned solely with Teller's activities. They charged that on July 23, 1966, he received etc. 335.870 grams of heroin; 16.3 grams of marihuana, 7.5 grams of which were in the form of Hashish; and 41.850

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[2] The Statute provides:

"It shall be unlawful for any person to sell, barter, exchange, or give away narcotic drugs except in pursuance of a written order of the person to whom such article is sold * * * on a form to be issued in blank for that purpose by the Secretary or his delegate."

[3] The Statute provides, in pertinent part:

"Whoever fraudulently or knowingly imports or brings any narcotic drug into the United States * * * contrary to law, or receives, conceals, buys, sells, or in any manner facilitates the transportation, concealment, or sale of any such narcotic drug after being imported or brought in, knowing the same to have been imported or brought into the United States contrary to law * * * shall be imprisoned * * *."

grams of cocaine, in violations of Section 174, 176(a)[4] and 174, Title 21, United States Code, respectively.

Petitioner filed pre-trial motions to suppress and return two index cards seized from his home upon the purported authority of a search warrant executed concurrently with his arrest (Add.App. 2-3)[5] and for a severance from the co-defendant Teller. (Add. App. 1) Following a joint trial by jury, in which evidence relating to the charges against Teller alone was introduced but limited solely to Teller, both defendants were convicted of all charges. Petitioner was sentenced to concurrent terms of nine years in the custody of the Attorney General on each of Counts I and II.

Evidence Pertaining to Counts I and II

On the morning of July 14, 1966, Federal Narcotic Agents arrested Samuel Washington whom they charged with sales of narcotics on two different dates (Tr. 74)[6] and with

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[4] The Statute provides, in pertinent part:

"Notwithstanding any other provision of law, whoever, knowingly, with intent to defraud the United States, imports or brings into the United States marihuana contrary to law, or smuggles or clandestinely introduces into the United States marihuana which should have been invoiced, or receives, conceals, buys, sells, or in any manner facilitates the transportation, concealment or sale of such marihuana after being imported or brought in, knowing the same to have been imported or brought into the United States contrary to law * * * shall be imprisoned * * *."

[5] "Add. App." references are to the page of the Additional Appendix prepared by Petitioner for the Court of Appeals.

[6] "Tr." references are to the page of the Transcript of Proceedings filed in the Court of Appeals.

possession of narcotics. The agents took Washington to the narcotics bureau offices. (Tr. 78) At that time, or sooner, Agent Hill promised Washington (Tr. 285) that if he cooperated with them, his cooperation would be called to the attention of the United States Attorney. (Tr. 379) The insinuation, though, was that the agents would help Washington. (Tr. 150)

Washington had been convicted in 1944 of burglary and arson (Tr. 12-13), had been sentenced to serve six months in the county jail and five years probation on that conviction, and had subsequently been sent to the penitentiary for a violation of that probation and then again for a violation of parole after serving a portion of his sentence. (Tr. 105-106). He was a narcotic addict (Tr. 147-148) who had previously been convicted for violations of the narcotic laws (Tr. 110), who would do a lot of things to stay out of jail, depending on what he had to lie about (Tr. 151-152), and who prior to July, 1966, had lied when his liberty was at stake. (Tr. 144) He was, at the time in question, a receiver and seller of stolen goods (Tr. 101) and a seller of narcotics, who maintained three apartments from which he conducted his narcotics and receiving businesses. (Tr. 78-79) He had previously informed on other receivers to Teller and Sullivan, who were Chicago Police officers. (Tr. 102)

In March, 1966, the Chicago Police arrested Washington and, in the execution of a search warrant, searched one of his apartments. As a result, Washington was indicted in the Criminal Division of the Circuit Court of Cook County, and that indictment was still pending at the time Washington testified. Teller, prior to the events leading to the instant charge, had told Washington that it was he who was responsible for having the search warrant issued. (Tr. 103-104)

The agents kept Washington in custody until 4:00 P.M. when he was taken before the United States Commissioner and released on his own recognizance. (Tr. 80) He left with Agent Charles Jackson and returned to his apartment. (Tr. 82 408) At 6:00 o'clock, Washington unsuccessfully tried to telephone the defendant Teller at police Area 2 Burglary. He left a message.

Washington and Jackson left Washington's apartment at approximately 8:30 P.M. and went to a corner where they met other agents. (Tr. 15-16, 411, 469) Jackson searched Washington and then gave him $1500 (the serial numbers of which had been previously recorded—Tr. 359-363). Jackson also installed a Kel transmitter on Washington. (Tr. 16, 412, 188, 459-460) Jackson then drove Washington a short distance where Washington got out and walked. Jackson followed Washington on foot. (Tr. 17, 412) Other agents observed. (Tr. 189, 461)

While watching Washington, Agents Hill and Meyer saw Petitioner driving a police car. Petitioner drove around the area for approximately an hour and a half, once following a car driven by Agent Bottorf and another time following Agent Hill. (Tr. 189-190, 461-462) The area was admittedly within Petitioner's district. (Tr. 308) Petitioner eventually stopped at a corner and picked up Washington. (Tr. 17, 190, 412, 462)

The conversation between Petitioner and Washington was monitored on the Kel set receiver by Agents Hill and Meyer. (Tr. 191) Washington said he had $1500 on a bill he owed, and he wanted to "cop" (*i.e.* stock) again. Petitioner said he would have to see "Shelly" first, and that Sheldon had been sick. (Tr. 19, 197, 467) He said he was late because he had seen a lot of federal narcotic agents in the vicinity and asked if they had been following Wash-

ington, who answered that he didn't think so. (Tr. 20, 197, 467) A car containing agents passed them and Petitioner asked Washington to get the license number. (Tr. 20, 198-199, 470) The two made arrangements to meet the following day. (Tr. 21, 470) Washington gave Petitioner the $1500 (Tr. 23), left and met the agents. He was searched; no money was found. (Tr. 23-24, 200, 412, 420, 470) Washington had no further contact with the agents until seven days later, on July 21st. (Tr. 91)

On that morning, Washington met Hill and Kerstann. (Tr. 24, 200-201) The agents asked him to make another phone call. (Tr. 92) He called a number where, after being told that Teller was asleep, he left a message. (Tr. 24, 202) During this conversation, Hill used a tape recorder which he fastened to the receiver end of the phone. (Tr. 93-94) After the call they were eventually joined by Agent Jackson. Kerstann and Hill recorded serials numbers on $800 which Washington had. (Tr. 204) Washington and Jackson went to a motel and registered. (Tr. 25, 420) Kerstann and Hill returned to their office where they drew $2200 in official advance funds and recorded the serial numbers. (Tr. 204, 502-503) They then returned to the motel and gave Washington the $2200. (Tr. 204, 205)

Prior to this, Washington, with Jackson listening in, called Teller. Teller said that he had just gotten out of bed and asked Washington to call him at the police station later. (Tr. 27, 422-429) Washington made this second call, again with Jackson listening in, and told Teller where he was staying. Teller said he would call about 8:00 o'clock. (Tr. 27-28, 429-430) Teller called at 7:30. Again, Jackson listened, this time attaching a tape recorder to the receiver. (Tr. 98) Teller said he would see Washington in about a half hour. (Tr. 28, 431) Teller called again about

8:00 or 8:30 and asked Washington to meet him. (Tr. 29, 431) Jackson searched Washington and again installed a Kel set on his person. (Tr. 29, 206-208, 432, 505) Hill and Kerstann, who were present during this search, left. (Tr. 208, 505) Washington left the motel and walked a short distance to where Teller and Petitioner were parked. (Tr. 29) This was observed by other agents. (Tr. 208, 506) The ensuing conversation among Washington, Teller and Petitioner was overheard by Agents Hill, Kerstann and Jackson, who had remained in the motel. (Tr. 209-210, 567, 434) Teller asked Washington how much money he had, and Washington replied $3,000 and he would owe a balance. Teller asked what Washington wanted and Washington said the same as before—one fourth a kilo of "boy" (heroin). Washington asked when he could get it, and Teller asked Petitioner when he could make it. Petitioner replied at 11:00 or 11:30 that night. Washington said he would be at the motel until he got a call. (Tr. 31-32) Washington gave the $3,000 to Teller (Tr. 32) left the car and walked back to the motel. Jackson searched him. Washington did not see either defendant again that evening. (Tr. 32, 434-435)

The following morning, Washington, with Jackson again listening in, called Petitioner. Washington asked if he or Teller had tried to get in touch with him the night before. Petitioner said he had not and did not know whether Teller had. (Tr. 33, 435-436) Later that day, Washington called Police Area 2 Burglary and spoke to Teller. Jackson listened in. Teller said there had been a lot of narcotic agents in the vicinity of the motel and he decided to call it off, and also that he didn't want to come over to the motel. Washington asked if it would be all right if he left and checked into another motel. Teller said to call and leave his room number after he did so. (Tr. 35-36, 437-438)

Jackson preceded Washington to the Seville Motel (Tr. 438) where Washington checked into room 128. (Tr. 36-37, 211) He then called and left a message for Teller. Jackson said that Washington came to his, Jackson's, room sometime after 6:00 o'clock. (Tr. 438-439) Washington was searched and a transmitter was placed on his person. He told Jackson he was in room 128 and left. Jackson remained in his own room, 123. (Tr. 439)

Teller called Washington about 10:00 P.M. He asked Washington to meet him in back of the motel right away. (Tr. 39-40) According to Washington, Jackson went to his own room right after this call, and Washington left approximately three minutes later. (Tr. 130) Jackson, of course, testified he remained in his own room throughout the evening. (Tr. 439)

Meanwhile, Hill and Kerstann were cruising in the area. At approximately 10:00 P.M., they saw a blue Plymouth police car. Petitioner was driving and Teller was a passenger. The agents followed. The police car turned south into an alley behind the motel. The agents turned north into the same alley and parked behind a gasoline station located on the corner. They saw the police car stop and the passenger get out, walk to a telephone pole, bend down and then get back into the police car. The car then continued south where it turned out of view. (Tr. 212-213, 571-572)

Jackson, in the meantime, had been looking out the window of his room. He saw Teller and Petitioner drive up and park near the telephone pole. (Tr. 439) Teller exited the car from the passenger side, walked to the pole and placed a black stocking at the base of the pole. (Tr. 440) He first testified that he waited for a few minutes and then observed the car return to approximately the same position

in the alley and pick up Washington. (Tr. 440) Later, he said that after the car left the alley the first time he left his room, went to the pole, picked up the black stocking which was rolled into the shape of a baseball, observed it, placed it back at the base of the pole, returned to his room and watched the pole. (Tr. 443) Hill and Kerstann observed Jackson walk over to the pole and then walk back toward the motel. (Tr. 213, 573)

Washington, in the meantime, had gone down to the parking lot to wait for Teller and Petitioner. He originally said he saw Teller and Petitioner just entering the alley when he got out in back. (Tr. 40) Later he said he waited in the parking lot for approximately three minutes before the car pulled up, and he did not notice anything about a package at that time. (Tr. 131) Hill and Kerstann observed the car pull into the alley a second time approximately five minutes after Jackson returned to his room. (Tr. 213, 513) Washington got in the back seat (Tr. 41, 440) and the car drove off. (Tr. 214, 573) Jackson (Tr. 442-444), Hill (Tr. 215) and Kerstann (Tr. 574) overheard the conversation among Washington, Teller and Petitioner. Teller said he had only brought one-eighth of a kilo instead of one-quarter and that he wanted his money, $2200 additional for that eighth plus $2200 or $2300 that Washington owed him for past transactions, as soon as possible, Sunday at the latest. Just before Washington got out of the car, Teller told him the package was by a telephone pole in back of the motel. The car returned to the same spot and Washington walked over to the telephone pole and recovered a man's grey knee-length sock. (Tr. 42-43) He was observed by Jackson, Hill and Kerstann. (Tr. 216, 444, 575) The car turned out of the alley and left. (Tr. 216) Washington walked over to Jackson's room and gave him the stocking. (Tr. 44, 445)

In the stocking was a Trojan prophylactic, knotted at the end and containing a plastic bag sealed with masking tape. The bag contained 150 grams, 940 milligrams, of heroin. (Tr. 896) Washington had not given either defendant a written order on a form issued in blank for that purpose by the Secretary of the Treasury, or his delegate. (Tr. 44)

Washington was never indicted on the charges for which he was arrested on July 14th. (Tr. 81, 289)

Search of Petitioner's Residence

Petitioner's residence was searched pursuant to a search warrant the following day, July 23rd. The warrant was issued on the basis of an affidavit by Agent Hill which recited:

> "The undersigned being duly sworn deposes and says:
>
> "That he has reason to believe that on the premises known as Apt. 409, Versailles Apartments, at 5234 S. Dorchester, Chicago, Ill. in the No. District of Ill. there is now being concealed certain property, namely, money which is the fruit of a crime to-wit, a violation of Title 21, Sec. 174 U. S. Code.
>
> "And that the facts tending to establish the foregoing grounds for issuance of a Search Warrant are as follows:
>
> "Information from Samuel Washington, that he paid John Sullivan, occupant of said premises, $1,500, for narcotic drugs July 14, 1966 and that he Sullivan was present when $3,000 was paid to Sheldon R. Teller by him on July 21, 1966. Carl L. Jackson, a nar. agt. informed complainant he saw the delivery of the narcotics on July 22, 1966." (App. 16)[7]

[7] "App." references are to the Appendix filed by Teller and joined by Petitioner in the Court of Appeals.

The warrant commanded the agents to search for and seize "money which is the fruit of a crime to-wit, a violation of Title 21, Sec. 174 U.S. Code * * *" (App. 16)

Four agents and a Chicago Police Officer executed the warrant. They knocked at the door to Petitioner's apartment. When he answered they announced their purpose and one of the agents read or showed the warrant to him. (App. 27) They arrested Petitioner and then "by virtue of the search warrant searched the apartment." (App. 27) Petitioner was handcuffed and advised of his constitutional rights before the warrant was read. They were standing in the living room-bedroom at the time. A thirty-five minute search, during which the Petitioner was present, ensued. (App. 28) Two 3 x 5 index cards were seized from the top of Petitioner's dresser (App. 90), although, as the Government admitted in the court below (G.Br., pp. 14-15), whether the dresser was in the same room in which Petitioner was arrested is not clear. A number of other items not described in the warrant were also seized, but were returned to Petitioner before trial. The two cards, bearing 1966 license numbers, six of which had been assigned to narcotics agents in the Chicago area, were introduced into evidence against Petitioner. (App. 84-5; 90-2) None of the described currency was found. (App. 17) The District Judge, "relying heavily" upon *Harris* v. *United States,* 331 U.S. 145, 67 S.Ct. 1098, and also upon *Marron* v. *United States,* 275 U.S. 192, 48 S.Ct. 74, (App. 28), found the "warrant valid on [its] face" (App. 29), but, because the warrant called only for the seizure of money, "That search would fall on the face of the warrant * * * *" (App. 32) Nevertheless, the search and seizure were sustained as an incident of the arrest (pursuant to an arrest warrant) of Petitioner. (App. 32-33)

Search of Teller's Residence

Teller's home was searched pursuant to a warrant the same day. In addition to other items, the subject of Counts III, IV and V (see text, *infra*), the agents found $2,700 of the previously recorded funds used on July 21st among other monies discovered on the premises. (Tr. 775-778)

Evidence Pertaining to Counts III, IV and V

Evidence relating to Counts III, IV and V was all secured from the raid which took place at Teller's home. It was admitted only against Teller and the jury instructed not to consider items found in Teller's home (with the exception of $2,700) against Petitioner. (Add. App. 19-20). In summary, the agents found 266 grams, 50 milligrams of heroin in a plastic bag which was inside of a Trojan rubber prophylactic contained in a man's black stocking (Tr. 594-595); 497 milligrams of heroin in a small plastic vial in the drawer of a nightstand (Tr. 622); 25 grams, 950 milligrams of cocaine in a sealed plastic baggie inside an overnight case (Tr. 606); 34 grams, 116 milligrams of cocaine in another plastic baggie (Tr. 609); 70 grams, 40 milligrams of cocaine in a brown paper sack and baggie inside the overnight case (Tr. 614); 8 grams, 954 milligrams of cocaine in a brown medicine bottle (Tr. 618); 799 milligrams of cocaine found in a dixie cup on top of a nightstand (Tr. 623); 8 grams, 664 milligrams of marihuana found in two bottles inside a plastic pouch which was atop a dresser (Tr. 630-631); and 7 grams, 413 milligrams of hashish found in a bottle in the same pouch. (Tr. 635; 898-910, 913-916)

The agents also recovered $45,571 United States currency in varying denominations (Tr. 246, 253, 584), a "sock-package" which appeared to Hill to be identical to the one

he received the previous evening (Tr. 246-248), several cubes of manite, plastic baggies, a sifter and metal mixing bowls with traces of white powder in them, masking tape, Trojan rubber prophylactics, a piece of screen, cans of lactose, scales, a bottle of quinine and several bottles of pills. (Tr. 248-249, 636, 653, 642) In addition, they found a piece of paper and some business cards bearing 1965 license numbers, two of which had been assigned to federal narcotic agents. (Tr. 658-662) The agents testified that the manite, quinine and lactose were used in the preparation of heroin. (Tr. 252, 650-651)

Disposition of Objections to Joinder by Courts Below

Prior to trial (Add. App. 1), and on several occasions during the trial (Add. App. 5, 9-10, 11, 14, 18), Petitioner moved for a severance from his co-defendant Teller on the ground that the indictment misjoined the defendants (See, *e.g.*, Add. App. 11, 14) These motions—based on the fact that Counts III, IV and V, charging possessory offenses against Teller only, were improperly joined in the indictment and tried along with Counts I and II—were recognized,[8] but overruled. (See, *e.g.*, Add. App. 17-18, 19-20)

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[8] At the conclusion of the Government's case, Petitioner moved that the jury be instructed that the evidence seized from Teller did not apply to him. The court instructed the jury "* * * that all of the exhibits which have been received in evidence which relate to matters, items which were found in the home of the defendant * * * Teller are not admitted into evidence at this time as to the defendant Sullivan." (Add. App. 19) Immediately thereafter, the Assistant United States Attorney moved only that "* * * the $2700 in currency recovered from the home of the defendant Sheldon R. Teller on July 23rd, 1966, * * * [be] admitted as to both defendants * * * *" The court granted this motion. (Add. App. 19-20)

In response to Petitioner's claim that the joinder illustrated by this case was absolutely prohibited by Rule 8(b) of the Federal Rules of Criminal Procedure, and that, in any event, Petitioner was prejudiced by the joinder, the Court of Appeals held:

> "Sullivan claims prejudice arising from his misjoinder in indictment and trial with Teller. * * * The several offenses charged here—sale, fraudulent and knowing receipt, transportation, and concealment—had a close connection, and it is apparent that the substantial rights of Sullivan were not prejudiced by the joinder. See Schaffer v. United States, 362 U.S. 511 (1960)." (App. A, *infra*, p. 8)

REASONS FOR GRANTING THE WRIT

I.
Misjoinder of Defendants

When this Court last considered the question of joinder of defendants under Rule 8(b) of the Federal Rules of Criminal Procedure, it held that defendants, who initially were properly joined in an indictment charging several substantive offenses and a conspiracy to commit these offenses, could not complain of prejudicial misjoinder when it appeared, during the trial, that the conspiracy charge was factually ill founded. *Schaffer* v. *United States,* 362 U.S. 511, 80 S.Ct. 945 (1960). Because the case was submitted to the jury "under a charge which was characterized by petitioners' counsel as being 'extremely fair' * * * [in that it] meticulously set out separately the evidence as to each of the petitioners and admonished the jury that they were 'not to take into consideration any proof against one defendant and apply it by inference or otherwise to any other defendant'" (362 U.S. at 515, 80 S.Ct. at 948), the Court held that no prejudice was shown to warrant "subsequent severance" pursuant to Rule 14 of the Federal Rules. In some quarters—although not in all—this decision has come to be interpreted as meaning that a retroactive misjoinder, brought about during trial by the dismissal of the charge which originally justified joinder, is not subject to the same attack as initial misjoinder. See, e.g., *King* v. *United States,* 1st Cir. 1966, 355 F.2d 700, 704; *United States* v. *Granello,* 2nd Cir. 1966, 365 F.2d 990, 994-95; *Peterson* v. *United States,* 8th Cir. 1969, 405 F.2d 102, 105-106; 8 Moore's Federal Practice (Cipes), par. 8.06[3], pp. 8-37—8-40.

The Court has not spoken, however, on the three issues posed by the instant case of joinder: 1) What joinder is permissible under Rule 8(b) of the Federal Rules, and, in making that decision, to what extent does Rule 8(a) apply; 2) may a misjoinder, contrary to Rule 8(b), ever be regarded as harmless; and 3) if so, what criteria should be employed in gauging the harmlessness of the misjoinder. While there are numerous decisions of the Courts of Appeal regarding these important questions under the Federal Rules of Criminal Procedure,[9] the decisions—both within each circuit and among the various circuits—are in conflict. Furthermore, the decision in the present case represents such a departure from the standards suggested by the Court in *Schaffer* and established by many of the other circuits, as well as by previous decisions of the Seventh Circuit, "as to call for an exercise of this Court's power of supervision."

The present case serves as an excellent vehicle for resolving these issues. The initial statement in that portion of the decision dealing with the Petitioner's claim

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[9] We respectfully submit that it is not hyperbole to label the issues here as "important questions under the Federal Rules of Criminal Procedure." The American Bar Association Project on Minimum Standards for Criminal Justice has devoted separate consideration to the problems of "Joinder and Severance" and, on November 1967, the Advisory Committee on the Criminal Trial filed its recommendations on the subject. The Advisory Committee considered "the joinder and severance of offenses and defendants in criminal cases, a problem area of considerable dimensions in current criminal justice administration," (American Bar Association Project on Minimum Standards for Criminal Justice, "Standards Relating to Joinder and Severance," p. 1) and noted that "the federal courts have experienced considerable difficulty in applying the language of Federal Rule 8(b) to the variety of fact situations which have arisen * * * *" A.B.A. Standards, p. 14.

that Counts III, IV and V of the indictment had been misjoined with Counts I and II — "Sullivan claims prejudice arising from his misjoinder in indictment and trial with Teller" (App. A, *infra*, p. 8) — is susceptible of one of two interpretations: either the court below recognized that Sullivan had been misjoined in the indictment and for trial with Teller, and determined that such misjoinder was not prejudicial, or it wholly rejected the claim that the joinder was contrary to Rule 8(b). The concluding sentence—"The several offenses charged here * * * had a close connection, and it is apparent that the substantial rights of Sullivan were not prejudiced by the joinder" (App. A, *infra*, p. 8)—is reminiscent of standards established by Rule 8(a), but at the same time suggests that disposition was made on the basis that no prejudice was shown (and hence the citation of *Schaffer*).

1. The extent of joinder permitted by Rule 8(b).

It seems safe to concede that the lower federal courts are neither perplexed about, nor in conflict over the fact that the Federal Rules simply do not permit charges against one defendant to be joined in an indictment and for trial with charges against another unless all of the charges are factually related. This was the teaching of the Court in *McElroy* v. *United States*, 164 U.S. 76, 17 S.Ct. 31 (1896), and it has been clearly spelled out in Rule 8(b).

As the factual situations become more complicated, however, the courts have encountered greater difficulty in following uniform rules of joinder. Thus, charges against one defendant have, on occasion, been joined in indictment and for trial with charges against another where the first defendant was also named in the second group of charges,

even though the two sets of charges were factually unrelated. The Fourth Circuit, in *Ingram* v. *United States,* 4th Cir. 1959, 272 F.2d 567, and several of the other Circuits have forbidden this practice. See, e.g., *King* v. *United States,* 1st Cir. 1966, 355 F.2d 700; *United States* v. *Spector,* 7th Cir. 1963, 326 F.2d 345; *United States* v. *Gougis,* 7th Cir. 1967, 374 F.2d 758; *Haggard* v. *United States,* 8th Cir. 1966, 369 F.2d 968; *Metheany* v. *United States,* 9th Cir. 1966, 365 F.2d 90; *Ward* v. *United States,* D.C. Cir. 1961, 289 F.2d 877; *Cupo* v. *United States,* D.C.Cir. 1966, 359 F.2d 990; *cf. United States* v. *Granello,* 2nd Cir. 1966, 365 F.2d 990. It seems fairly safe to claim that all circuits would uniformly condemn such joinder. But see *Koury* v. *United States,* 6th Cir. 1963, 319 F.2d 75; *Kivette* v. *United States,* 5th Cir. 1956, 230 F.2d 749.

However, the courts are not at all uniform when it comes to the propriety of joining factually unrelated, but similar offenses. *Ingram* had explained that defendants charged with such offenses could not be properly joined. 272 F.2d at 569-70. This rule has been explicitly followed by the First Circuit (*King* v. *United States,* 1966, 355 F.2d 700), the Ninth Circuit (*Metheany* v. *United States,* 1966, 365 F.2d 90), and the District of Columbia Circuit (*Ward* v. *United States,* 1961, 289 F.2d 877), those courts recognizing that Rule 8(a), which permits joinder of offenses of the same or similar character, has no application where multiple defendants are involved. See also, *Cupo* v. *United States,* D.C.Cir. 1966, 359 F.2d 990, 992; *cert. denied,* 385 U.S. 1013, 87 S.Ct. 723 (1966); 8 Moore's Federal Practice (Cipes), par. 8.05, pp. 8-16—8-17.

Several circuits, the Seventh included, continue to give some consideration to whether the offenses charged are of the same or similar character. See, e.g., *Koury* v.

United States, 6th Cir. 1963, 319 F.2d 75; *Johnston* v. *United States,* 10th Cir. 1958, 260 F.2d 345, 348; *Kivette* v. *United States,* 5th Cir. 1956, 230 F.2d 749, 753; *Gajewski* v. *United States,* 8th Cir. 1963, 321 F.2d 261. In *United States* v. *Spector,* 7th Cir. 1963, 326 F.2d 345, the court considered the possible applicability of Rule 8(a), correctly decided the case on the basis of Rule 8(b), but nevertheless arrived at this conclusion because there was no "identity of defendants, *of the character of the offenses, the allegations of fact,* or of the time." 326 F.2d at 351 (emphasis supplied). But see, *United States* v. *Gougis,* 7th Cir. 1967, 374 F.2d 758.

The opinion in the present case is susceptible to that challenge. In it, the court speaks of the fact that "The several offenses charged here—sale, fraudulent and knowing receipt, transportation, and concealment—had a close connection * * *" but the close connection, if any, was only because of the similarity of the offenses. What has happened, of course, is that Petitioner's challenge to the propriety of the joinder has been decided on the basis of what was proper insofar as Teller was concerned. Thus, Counts I through V were properly joined in the indictment and for trial as long as Teller was the only defendant, because they charged "similar" offenses. Rule 8(a), Fed. R.Crim.Pro., 18 U.S.C.A. Teller and Petitioner were properly joined in Counts I and II because those charges amounted to an allegation that they "participated in the same act or transaction or in the same series of acts or transactions constituting an offense or offenses." Rule 8(b), Fed.R.Crim.Pro., 18 U.S.C.A. But the Government was not entitled to have it both ways. When it chose to indict more than one defendant, joinder was governed by Rule 8(b) exclusively. *Ward* v. *United States,* D.C.Cir.

1961, 289 F.2d 877; *King* v. *United States,* 1st Cir. 1966, 355 F.2d 700; *Cupo* v. *United States,* D. C. Cir. 1966, 359 F.2d 990. And Rule 8(b) permits joinder of multiple defendants only where the counts in which they are jointly and severally charged represent acts or transactions constituting an offense. See *United States* v. *Granello,* 2nd Cir. 1966, 365 F.2d 990, 994. No one has yet contended that the facts in Counts III, IV and V are part of the same offense as charged in Counts I and II, or that together they constitute an offense.

2. Misjoinder may not be considered harmless.

As noted, the Opinion of the Court of Appeals is susceptible of the interpretation that the misjoinder in this case, while in violation of Rule 8(b), is harmless. (Rule 52(a), Fed.R.Crim.Pro., 18 U.S.C.A.) That any violation of Rule 8(a) may be considered harmless has been specifically rejected by the First (*King* v. *United States,* 1st Cir. 1966, 355 F.2d 700), the Fourth (*Ingram* v. *United States,* 4th Cir. 1959, 272 F.2d 567), the Ninth (*Metheany* v. *United States,* 9th Cir. 1966, 365 F.2d 90) and the District of Columbia Circuits (*Ward* v. *United States,* D.C. Cir. 1961, 289 F.2d 877; *Cupo* v. *United States,* D.C.Cir. 1966, 359 F.2d 990).[10] The Eighth (see *Haggard* v. *United*

[10] Thus the Fourth Circuit has said:

"Rule 8(b) * * * provides that two or more defendants *may* be jointly charged if they are alleged to have participated in the same act or transaction. The necessary inference from this is that they *may not* be jointly indicted or tried in the absence of a common act or transaction. * * * [T]he joinder of defendants and offenses totally unconnected is prohibited by Rule 8(b). This is not a matter of discretion; both the statutory language and the decided

States, 8th Cir. 1966, 369 F.2d 968, 972-3) and previously the Seventh Circuits (see *United States* v. *Gougis,* 7th Cir. 1967, 374 F.2d 758, 762; *United States* v. *Spector,* 7th Cir. 1963, 326 F.2d 345, 350-51), have intimated that any violation of Rule 8(b) was per se prejudicial. See also, 8 Moore's Federal Practice (Cipes), par. 8.06[3], p. 8-41 n.51, suggesting that the majority in *Schaffer* v. *United States,* 362 U.S. 511, 80 S.Ct. 945 (1960), felt likewise.

The Second Circuit, however, in a case in which the Government could have introduced all of the evidence against both defendants at the separate trial of either, has ruled that misjoinder may be considered harmless. *United States* v. *Granello,* 2nd Cir. 1966, 365 F.2d 990. *Granello* represents a special circumstance not here present, in that the evidence of Teller's July 23rd possession of heroin, marijuana, hashish, cocaine and narcotics para-

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cases make this clear." Ingram v. United States, 4th Cir. 1959, 272 F.2d 567, 569 (emphasis in original).

The First Circuit has held:

"A joinder of offenses, or of defendants involves a presumptive possibility of prejudice to the defendant, and of benefit to t court, by which term we include the government and the public. Although the two matters are disparate and difficult to compare, the prejudice may be relatively small, compared to the benefit, and hence tolerable. Rule 8 is an attempt to set the limits of tolerance, and any joinder which does not fall within it is per se impermissible." King v. United States, 1st Cir. 1966, 355 F.2d 700, 703.

And the District of Columbia Circuit has ruled that "where multiple defendants are charged with offenses in no way connected, and are tried together, they are prejudiced by that very fact, and the trial judge has no discretion to deny relief." Ward v. United States, D.C.Cir. 1961, 289 F.2d 877, 878.

phernalia was clearly not admissible against Petitioner. *Cf. e.g., Enriquez* v. *United States,* 9th Cir. 1963, 314 F.2d 703, 714, 717.

The Third Circuit, too, in a case in which the defendant was jointly indicted with others in three counts and the sole defendant in three others, has ruled that misjoinder may be harmless, but special circumstances also justified that decision. The other defendants had pleaded guilty before trial, and the three counts in which the remaining defendant was named alone were dismissed by the Government at the close of its case. Thus the defendant could not imaginably have been prejudiced. *United States* v. *Carter,* 3rd Cir. 1968, 401 F.2d 748, *cert. den.* ..... U.S. ....., 89 S.Ct. 905 (1969). Compare, *Ward* v. *United States,* D.C. Cir. 1961, 289 F.2d 877.

It is also noteworthy that in considering a claimed prejudicial misjoinder of counts in violation of Rule 8(a), the District of Columbia Circuit has only recently reaffirmed its prior decisions that "When unrelated offenses committed by separate defendants are joined for trial, in violation of Rule 8(b), no further inquiry into special prejudice is required." *Baker* v. *United States,* D.C.Cir. 1968, 401 F.2d 958, 973. Thus, even though it eventually ruled that there was no reason for ignoring the harmless error rule where no prejudice from the *joinder of counts* could have occurred, the court reiterated its reasons for holding otherwise with respect to joinder of defendants:

> "Such a rule is justified since the introduction at the trial of one defendant of evidence which in law is relevant only to the guilt of another *in itself* is prejudicial, and it would be inappropriate to speculate as to the extent to which that evidence may have affected the deliberations of the jury or embarrassed

the defendant in presenting his defense." 401 F.2d at 973-4 (emphasis in original).

3. The Petitioner was prejudiced by the joinder here.

Even assuming that a violation of Rule 8(b) may, on occasion, be considered harmless, the error in this case was not. Although the district judge admitted the evidence obtained from Teller's home (with the exception of $2,700) only against Teller, *Bruton* v. *United States,* 391 U.S. 123, 88 S.Ct. 1620 (1968), has taught how ineffective a remedy this may be where there is grave danger the jury may not be able to separate the evidence as to the individual defendants. As the Ninth Circuit has recognized from this Court's holding in *McElroy* v. *United States,* 164 U.S. 76, 17 S.Ct. 31 (1896):

> "* * * [A]ny defendant who suffered a conviction was entitled to a new trial separate from the others for the reason that '(i)t cannot be said in such a case that all the defendants may not have been embarrassed and prejudiced in their defense, or that the attention of the jury may not have been distracted to their injury in passing upon distinct and independent transactions.'" *Metheany* v. *United States,* 9th Cir. 1966, 365 F.2d 90, 94-5.

The plethora of narcotics and narcotics paraphernalia discovered in Teller's home clearly indicated that Teller was deeply involved in the business of narcotics. Under these circumstances Petitioner must have been substantially prejudiced in the eyes of the jury, if for no other reason than merely because of his alleged association with Teller in respect to the charges contained in Counts I and II. Rule 8(b) was designed to alleviate this prejudice. Here, the courts below have disregarded the pro-

tection afforded by the Rule in the interests of expediency and in the hope that instructions to the jury would prove effective. The Court should grant its writ of certiorari to determine whether those hopes and interests are of greater value than the Rule.

II.
Unconstitutional Search and Seizure

1. The affidavit in support of the warrant for the search of Petitioner's apartment did not state facts showing that the property to be seized was located on the premises.

Repeatedly over the last half decade this Court has insisted that affidavits for search warrants particularize facts from which the magistrate can make his own independent judgment that the property to be seized is located on the premises to be searched. " * * * [I]n a criminal investigation, the police may undertake to recover specific stolen or contraband goods. But that public interest would hardly justify a sweeping search of an entire city conducted in the hope that these goods might be found. Consequently, a search for these goods, even with a warrant, is 'reasonable' only when there is 'probable cause' to believe that they will be uncovered in a particular dwelling." *Camara* v. *Municipal Court of the City and County of San Francisco,* 387 U.S. 523, 535, 87 S.Ct. 1727, 1734 (1967). Where the affidavit has been based on what the affiant was told by an informant, the Court has required that it "set forth * * * the 'underlying circumstances' necessary to enable the magistrate independently to judge of the validity of the informant's conclusion that the narcotics were where he said they were * * * *" *Spinelli* v. *United States,* ..... U.S. ....., 89 S.Ct. 584, 587 (1969); see also, *Aguilar* v. *Texas,* 378 U.S. 108, 114, 84 S.Ct. 1509, 1514 (1964); *Lowrey* v. *United States,* 8 Cir. 1947,

161 F.2d 30, 33. Finally, where the affidavit is based upon what the affiant was told by the informant, it must set forth facts supportive of the claim that the informant was credible or his information reliable. *Aguilar* v. *Texas, supra; Spinelli* v. *United States, supra.*

The affidavit in this case fulfilled none of these functions. It recited Hill's *belief* that money was located in Petitioner's apartment, but there were no averments of fact to support that belief. The affidavit contained an averment that Hill had been told by Washington that he had paid Petitioner $1,500 nine days earlier, and that Petitioner had been present when Washington paid Teller $3,000 two days earlier. Neither of these recitations gave any support to Hill's belief that the money was then located in Petitioner's apartment.

The Court of Appeals did not respond to this facet of Petitioner's argument. Instead, it held: " * * * [The] decision in *United States* v. *Whitlow,* 339 F.2d 975 (7th Cir. 1964), is of no aid to defendants. The affidavit there was based on the 'rankest sort of hearsay.' *Id.* at 979. We think Hill's affidavits enabled the Commissioner to perform his neutral and detached function of determining probable cause. The affidavit declared the source of Hill's information and the basis of his belief that the money was the fruit of narcotics law violations. More important it informed the Commissioner of the circumstances underlying the narcotics sale. He could have reasonably concluded that Washington was a reliable informant. We think this is a common sense interpretation of the affidavits. *United States* v. *Vetresca,* 380 U.S. 102 (1965) * * * " (App. A, *infra,* pp. 6-7)

The question of whether Washington was a reliable informant, of course, is secondary to whether the affidavit stated facts showing probable cause to believe the money was located on the premises to be searched. But even then, the affidavit in support of the warrant for the search of Petitioner's apartment did not aver facts enabling the Commissioner to conclude that Washington was credible or his information reliable—much less an averment that he was. In this connection, although Hill alleged that Agent Jackson observed "the delivery of the narcotics on July 22, 1966," this does not give substance to Washington's claim that he paid Petitioner $1,500 for narcotics on July 14th and Teller $3,000 in Petitioner's presence on July 21st, even if Jackson's statement is construed to mean that he observed delivery by Teller and Petitioner to Washington. Cf. *Spinelli* v. *United States*, ... U.S. ....., 89 S.Ct. 584 (1969).

2. The agents were not entitled to seize two index cards not described in the warrant from Petitioner's apartment.

Whatever the validity of the search warrant, the property introduced into evidence was not seized under its authority. The district judge reasoned that it was taken as an incident to a valid arrest[11] of Petitioner and relied

[11] Agent Hill had obtained an arrest warrant for Petitioner at the same time as he obtained the search warrant. The complaint for that warrant alleged:

> "* * * information from Samuel Washington that he arranged with said defendants [Teller and Petitioner] to furnish him a quarter of a kilo of heroin for $4500. On July 14 he gave Sullivan $1500 and on July 21 he gave Teller $3000 in the presence of Sullivan. According to Nar. Agt. Carl L. Jackson, he observed the delivery of a package from defts on the night of July 22. Complainant subjected

"heavily" on *Harris* v. *United States,* 331 U.S. 145, 67 S.Ct. 1098 (1947), and *Marron* v. *United States,* 275 U.S. 192, 48 S.Ct. 74 (1929). (App. 29) Relying upon an assumed concession by Petitioner "that any officer may seize items which are in plain sight in addition to those specified in a warrant," the Court of Appeals held: "The agents performing the search noticed these cards on top of a dresser in Sullivan's apartment. Since they were on top of the dresser they were in plain view of the searching agents, and thus properly seized. The mere fact that these cards were evidentiary and not fruits or instrumentalities of the crime does not preclude them from being seized. *Warden* v. *Hayden,* 387 U.S. 294 (1967)." (App. A, *infra,* p. 8) This disposition of Petitioner's claims raises two issues which this Court, in the exercise of its powers of supervision, ought to decide.

In *Chimel* v. *California,* ..... U.S. ....., 89 S.Ct. 2034 (1969), the Court overruled *Harris* and *United States* v. *Rabinowitz,* 339 U.S. 56, 70 S.Ct. 430 (1950), and ruled that the scope of a search incident to an arrest must be limited to the area from within which the defendant might

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the contents of a (sic) said package to a field test which showed a positive reaction indicating the presence of a derivative of opium."

Although made a part of the Government's supplemental Record on Appeal, the complaint and its sufficiency was not considered by the district judge. While he based his finding of the legality of the search on the basis of a search incident to a lawful arrest, that was not the theory upon which the Government presented its case in the trial court. Both Agents Coulter and Jackson testified that the search of Petitioner's apartment was based upon the search warrant. (App. 28, 92) The seized property was returned on the warrant. (App. 17-18; 90) The arrest warrant and the complaint were never introduced at the hearing.

obtain a weapon or something that could be used as evidence against him. 89 S.Ct. at 2043. Although *Chimel* considered only the permissible scope of a search incident to a lawful arrest, the principles announced therein are equally applicable to searches pursuant to a search warrant. "The requirement that warrants shall particularly describe the things to be seized makes general searches under them impossible and prevents seizure of one thing under a warrant describing another. As to what is to be taken, nothing is left to the discretion of the officer executing the warrant." *Marron* v. *United States,* 275 U.S. 192, 196, 48 S.Ct. 74, 76 (1927); see also, *Stanford* v. *Texas,* 379 U.S. 476, 485, 85 S.Ct. 506, 511-12 (1965). The Constitutional proscription against general searches will not permit an exploratory search for and seizure of evidence except in that rare instance where the item seized is an instrumentality of the crime itself or recognizable as contraband and is in "plain view." Compare *Marron* v. *United States,* 275 U.S. 192, 199, 48 S.Ct. 74, 77 (1927) with *Takahashi* v. *United States,* 9th Cir. 1944, 143 F.2d 118, 123-5. Even then, *Chimel* has restricted this "plain view" doctrine to those situations in which protection of the arresting officers or preservation of evidence is necessary. 89 S.Ct. at 2040.

The Court of Appeals misapplied the "plain view" doctrine on all counts in this case. The index cards were not contraband, and they were not "instrumentalities" of the crime. (Compare App. 90-92 with 84-85) Petitioner was handcuffed prior to the time the four agents and one police officer began the search of his apartment. (App. 28) Thus he was physically restrained from reaching and destroying evidence. Even if his dresser had been in the same room where he was arrested—a fact not settled one

way or the other by the Record—the search and seizure of the two index cards was not justified by the circumstances. It was a general exploratory search. *United States* v. *Lefkowitz*, 285 U.S. 452, 52 S.Ct. 420 (1932); *Go-Bart Importing Co.* v. *United States*, 282 U.S. 344, 51 S.Ct. 153 (1931).

The Court of Appeals, relying on *Warden* v. *Hayden*, 387 U.S. 294, 87 S.Ct. 1642 (1967), also ruled that the fact that the two cards were "evidentiary" did not preclude their seizure or use in evidence. (App. A, *infra*, p. 8) *Hayden*, which sanctioned the seizure and use in evidence of items of clothing against the claim that they were mere evidence, specifically reserved for future decisions whether writings such as these cards could properly be seized and used in a criminal prosecution.

> "The items of clothing involved in this case are not 'testimonial' or 'communicative' in nature, and their introduction therefore did not compel respondent to become a witness against himself in violation of the Fifth Amendment. Schmerber v. State of California, 384 U.S. 757, 86 S.Ct. 1826, 16 L.Ed.2d 908. This case thus does not require that we consider whether there are items of evidential value whose very nature precludes them from being the object of a reasonable search and seizure." 387 U.S. at 302-3, 87 S.Ct. at 1648.

As exemplified by the present case, many courts now feel that *Hayden* has given the prosecution carte blanche authority to seize and introduce all items of evidence without regard to their inherent nature. Resolution of this issue as well as resolution of the "plain view" doctrine left open by *Chimel* would be well served by an examination of the present case.

III.

The Court of Appeals, although recognizing that this Court had granted certiorari in *United States* v. *White*, 7th Cir. 1969, 405 F.2d 838, *cert. granted*, ... U.S. ....., 89 S.Ct. 1305 (1969), refused to apply its decision in *White* retroactively, and decided that no benefit could accrue from holding its decision in this case in abeyance pending final resolution of *White*. For the reasons advanced by the co-defendant Sheldon Teller in his Petition for Certiorari, we respectfully submit that certiorari be granted in this case to decide this issue along with *White*.

Conclusion

For all of the reasons advanced herein, as well as for those reasons advanced by Petitioner Sheldon Teller, the Petition for Certiorari should be granted.

Respectfully submitted,

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On the Brief

APPENDIX

APPENDIX A

In the

United States Court of Appeals

For the Seventh Circuit

SEPTEMBER TERM, 1967 — APRIL SESSION, 1968

No. 16047
UNITED STATES OF AMERICA,
Plaintiff-Appellee,
v.
SHELDON R. TELLER and JOHN D. SULLIVAN,
Defendants-Appellants.

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division.

June 13, 1969

Before SCHNACKENBERG,[1] KILEY and FAIRCHILD, *Circuit Judges.*

[1] An original draft opinion was written by the late Elmer J. Schnackenberg and submitted to the judges who join in this opinion. Judge Schnackenberg died on September 15, 1968. On October 16, 1968, this court ordered this appeal held in abeyance until the final determination of *United States* v. *White*, 405 F.2d 838 (7th Cir. 1969), which was filed on January 7, 1969. We re-used somewhat his draft opinion, and have reached the same result except that we have treated differently the constitutional questions on the use of the Kel-set.

PER CURIAM. Defendants, Chicago police officers,[2] have appealed from their jury convictions, of selling and transporting narcotics in violation, respectively, of 26 U.S.C. § 4705(a)[3] and 21 U.S.C. § 174.[4] Teller individually appeals from his conviction of three similar offenses under 21 U.S.C. §§ 174 and 176(a)[5]. We affirm.

At 6:00 p.m. on July 14, 1966, Samuel Washington, a government informant, telephoned defendant Teller with narcotics agent Jackson listening on an extension phone. Later that evening narcotics agents searched Washington and equipped him with a Kel-set transmitter. Agent Jackson then drove Washington to the south side of Chicago. Washington met defendant Sullivan, got in his car and rode with him. While the two rode together, narcotics agent Hill overheard their conversation on a Kel-set receiver tuned to Washington's transmitter. Washington told Sullivan that he wanted to restock, and gave Sullivan $1,500 in currency whose serial numbers had been recorded by government agents. Sullivan responded that he would have to see "Shelly" first. The two men arranged to meet the following day when Washington said he would have additional money.

A week later Jackson listened to various telephone conversations between Washington and Teller during which they arranged a meeting later that night. Before

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[2] The indictment named both defendants in counts 1 and 2, and Teller alone in counts 3 through 5.

[3] The unlawful sale, barter or exchange of heroin.

[4] Fraudulent and knowing receipt, concealment, and facilitation of transportation and sale of heroin.

[5] Fraudulent and knowing receipt, concealment and facilitation of transportation of marijuana.

this meeting Washington was again searched, equipped with a Kel-set transmitter, and given recorded currency. Washington met both defendants, told Teller that he wanted one-fourth of a "kilo" of heroin, that he had $3,000, and asked when he could get it. Sullivan said it would be later, and Washington told defendants he would await their call at his motel room. Agent Hill overheard this conversation on his Kel-set receiver.

The next day agent Jackson listened while Washington talked to each defendant on the phone. Teller told Washington he had not met him because narcotics agents were in the vicinity. Washington arranged to meet both defendants at the rear of another motel to which he had moved. Agent Jackson saw defendants drive to the meeting place in a police car and saw Teller get out and bend down near a pole at the rear of the motel. After they had driven away, Jackson went to the pole, picked up a rolled-up black sock, examined it and replaced it. The defendants soon returned. Washington, equipped with a Kel-set, entered their police car. Teller told Washington that he had the heroin and needed his money in order to "cop" (restock) as he was out of the "stuff." He told Washington that his "stuff" was at the base of the pole. Agent Hill overheard this conversation on his Kel-set receiver. Washington left defendants' police car, found the rolled-up sock, and delivered it to agent Jackson.

The Bureau of Narcotics determined, that same night, that the white powder inside a container in the sock was heroin. The agents obtained federal arrest and search warrants for defendants and their residences. In a search of Teller's residence the next morning, agents recovered heroin, cocaine and marijuana, another rolled black sock

containing narcotics, together with narcotics-making apparatus and more than $45,000 in currency, including that previously recorded by the agents, given to Washington and passed by him to defendants. Simultaneously Sullivan's apartment was searched and agents there found several cards on which were recorded six automobile license numbers which had been assigned to narcotics agents.

The foregoing statement of events is from the evidence taken favorably to the government for which Washington was the principal witness. There is no contention that the evidence does not sustain the convictions. The contentions are, principally, that admission into evidence of testimony of agents of what was heard by use of the Kel-set device and of material seized in search of the residences was a violation of defendants' constitutional rights.

The use of the Kel-set transmitter and receiver by agent Hill predates December 18, 1967, the retroactive limit of the rule in *Katz* v. *United States,* 389 U.S. 347 (1967), set by the Supreme Court in *Desist* v. *United States,* 349 U.S. 244 (1969). The Supreme Court in the *Katz* opinion departed from the "trespass" theory of *On Lee* v. *United States,* 343 U.S. 747 (1952), testing the reasonableness of warrantless searches and seizures of informants' words. The *On Lee* rule consequently is the test of the unreasonableness of the use of the Kel-set before us. Under *On Lee,* since agent Hill did not trespass upon the persons or premises of defendants, his "eavesdropping" did not violate defendants' constitutional rights. There was, therefore, no error in the district court's admission of agents' testimony.

This court on October 16, 1968 ordered decision on the appeal before us held in abeyance pending final disposition

of the appeal in *United States* v. *White*, 405 F.2d 838 (1969). This court's opinion in the *White* appeal was filed January 7, 1969. The *White* decision was based principally on the Supreme Court's decision in *Katz* v. *United States*, 389 U.S. 347 (1967), which is not controlling here. The Supreme Court on April 8, 1969 granted certiorari applied for by the government in *White*. Despite the fact that granting of certiorari indicates that *White* is not final, it is our view that it would be imprudent to delay further decision in the appeal before us. The reasons are that we are convinced that no possible development with respect to *White* in the Supreme Court can influence our judgment we are now making in affirming the convictions here, and the necessity we feel of avoiding unnecessary delay in filing this opinion.

We see no merit in defendant's contention that the Illinois Eavesdropping Act, ILL. REV. STAT., ch. 38, § 14-1, et seq. (1967), precludes the admission of Kel-set evidence in a federal trial. *United States* v. *Martin*, 372 F.2d 63 (7th Cir.), *cert. denied*, 387 U.S. 919 (1967). Since federal standards govern here there is no violation of the Tenth Amendment.

We see no merit in defendants' challenge of the district court's denial of their motions to suppress the fruits of the searches on the ground that the affidavits on which the warrants issued were insufficient to establish probable cause. The affidavits[6] are signed by narcotics agent Hill,

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[6] The affidavits read as follows:

AFFIDAVIT FOR SEARCH WARRANT

BEFORE C. S. Bentley Pike, Chicago, Ill.

The undersigned being duly sworn deposes and says:

That he has reason to believe that on the premises known as dwelling and garage at 9736 S. Longwood Dr. Beverly Hills, Chicago, Ill. in the No. District of Ill. there is now being con-

and substantially state his belief that there is concealed money, fruit of violation of the narcotics laws, at the defendant's residence; that he had information from Washington that Washington had paid Teller $3,000 for narcotics; that he was informed by agent Jackson that Jackson had seen the narcotics delivered; that he had furnished Washington with the money and Washington paid the $3,000 to Teller; and that other named agents informed him they had observed Teller in possession of narcotics paraphernalia. This reasoning also applies to defendant Sullivan.

This court's decision in *United States* v. *Whitlow,* 339 F.2d 975 (7th Cir. 1964), is of no aid to defendants. The affidavit there was based on the "rankest sort of hearsay." *Id.* at 979. We think Hill's affidavits enabled the Commissioner to perform his neutral and detached function of determining probable cause. The affidavit declared the source of Hill's information and the basis of his belief that the money was the fruit of narcotics law violations. More important it informed the Commissioner of the circumstances underlying the narcotics sale. He

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cealed certain property, namely money which is the fruit of a crime to wit, a violation of Title 21. Sec. 174. U. S. Code.

And that the facts tending to establish the foregoing grounds for issuance of a Search Warrant are as follows:

Information from Samuel Washington, that he paid Sheldon R. Teller, occupant of said premises $3,000 for narcotic drugs July 21, 1966.

Carl L. Jackson, a U. S. agt. informed complainant he saw the delivery of the narcotics.

Complainant furnished Washington with the money. According to agts. Rendina and Hughes they observed said Teller in posses-

could have reasonably concluded that Washington was a reliable informant. We think this a common sense interpretation of the affidavits. *United State* v. *Ventresca*, 380 U.S. 102 (1965). We hold that the affidavits sufficiently showed probable cause and that there was no error in the district court's denial of the motion to suppress.

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sion of narcotic paraphernalia on May 4, 1966.

/s/ Charles E. Hill,
Signature of Affiant.
Narcotic Agent,

Sworn to before me, and subscribed in my presence, July 23, 1966.

C. S. Bentley Pike,
United States Commissioner.

AFFIDAVIT FOR SEARCH WARRANT

BEFORE C. S. Bentley Pike

The undersigned being duly sworn deposes and says:

That he has reason to believe that on the premises known as Apt. 409, Versailles Apartments, at 5234 So. Dorchester, Chicago, Ill. in the No. District of Ill. there is now being concealed certain property, namely money which is the fruit of a crime to-wit, a violation of Title 21, Sec. 174 U. S. Code.

An that the facts tending to establish the foregoing grounds for issuance of a Search Warrant are as follows:

Information from Samuel Washington, that he paid John Sullivan, occupant of said premises, $1500, for narcotic drugs July 14, 1966 and that he Sullivan was present when $3000 was paid to Sheldon R. Teller by him on July 21, 1966. Carl L. Jackson, a nar. agt. informed complainant he saw the delivery of the narcotics on July 22, 1966.

/s/ Charles E. Hill,
Signature of Affiant.
Narcotics Agent,

Sworn to before me, and subscribed in my presence, July 23, 1966.

C. S. Bentley Pike,
United States Commissioner.

Defendant Sullivan contends that the seizure of several index cards containing narcotics agents' license plate numbers from his apartment was outside the scope of the search warrant. The property specified in the search warrant was "money which is the fruit of a crime. . . ." The defendant has conceded, however, that an officer may seize items which are in plain sight in addition to those specified in a warrant. The agents performing the search noticed these cards on top of a dresser in Sullivan's apartment. Since they were on top of the dresser they were in plain view of the seaerching agents, and thus properly seized. The mere fact that these cards were evidentiary and not fruits or instrumentalities of the crime does not preclude them from being seized. *Warden* v. *Hayden,* 387 U. S. 294 (1967).

Sullivan claims prejudice arising from his misjoinder in indictment and trial with Teller. He relies upon *United States* v. *Spector,* 326 F.2d 345 (7th Cir. 1963). In *Spector* the conspiracy counts in the indictment were not based on the substantive counts, proof of the conspiracy counts was not of the same transaction as the substantive, and the conspiracy counts did not relate to the substantive counts. Clearly *Spector* has no application here. The several offenses charged here—sale, fraudulent and knowing receipt, transportation, and concealment—had a close connection, and it is apparent that the substantial rights of Sullivan were not prejudiced by the joinder. See *Schaffer* v. *United States,* 362 U.S. 511 (1960).

Teller claims that the district court was unduly restrictive in its ruling on the motion under 18 U.S.C. § 3500 for the production of statements of Washington, the main government witness. The court ordered production but, on the government's motion, deleted twelve

pages of one statement, and five paragraphs of a second, as unrelated to Washington's direct testimony. Before the deletion the district court made an in camera inspection of the documents, and the parts deleted were sealed and made part of the record on appeal. We have examined the deleted parts, and it is clear to us that defendants have not sustained their burden of persuading us that the parts deleted related to the direct examination of Washington. In the cases relied on by Teller, *Rosenberg* v. *United States,* 360 U.S. 367 (1959), *United States* v. *Borelli,* 336 F.2d 376 (2d Cir. 1964), and *United States* v. *Cardillo,* 316 F.2d 606, 615 (2d Cir. 1963), the statements were related. Thus these cases are not in point.

Teller argues, in addition, that he was denied the use of certain tape recordings, made by the government, of Washington's telephone conversations with him. He alludes to testimony that a tape recording was made. The government denies that tape recordings were made and points out that the testimony referred to by defendant pertains to Washington's attempt to call Teller, and at that time Washington did not reach Teller. The government has expressly represented to the district court and to this court that no tape recordings were made of conversations between Washington and Teller. We accept the government at its word and hold that no error was committed.

When Washington was being cross-examined by counsel for Teller, the court sustained the government's objection to a question seeking to elicit Washington's "present" address. Teller contends this ruling was a "flagrant" abuse of his right of cross-examination under the rule of *Alford* v. *United States,* 282 U.S. 687 (1931).

He argues that he was prevented by the ruling from developing whether Washington was a government "captive" being accorded special treatment for his "cooperation."

Washington testified that he was staying at a motel at government expense at the time of the trial. He also disclosed where he lived four months before trial and at the time of the offense before us. He further testified to his use of a pseudonym, his cohabitation with a woman not his wife, his use of narcotics, his possession of narcotics in one of his three apartments at the time of the alleged offense, his dealing with thieves in the sale of stolen property, his conviction of burglary and arson, and his violations of probation and parole. He testified he had not been indicted for his part in the transaction with defendants, and that he expected to help himself by testifying for the government.

We think that neither *Alford* nor *Smith* v. *Illinois,* 390 U.S. 129 (1968), requires a reversal of this conviction. *Smith* does not per se require a new trial merely because the district court sustained an objection to a question seeking to elicit Washington's address. *Smith* requires reversal only where the lack of a witness's name and address denies a defendant an opportunity to effectively cross-examine a witness. When this happens, a defendant is denied his Sixth Amendment right to confrontation. However, the initial question is whether the defendant was denied effective cross-examination. It is clear from the recital of Washington's testimony that the district court did not unduly limit cross-examination of Washington's past record.

Moreover, nothing in *United States* v. *Garafalo,* 390 U.S. 144 (1968), requires reversal. In *Garafalo,* the government witness had not been permitted to testify

what his address was. On appeal, *United States* v. *Garafalo,* 385 F.2d 200 (7th Cir. 1967), this court independently examined the record and determined that defendant was not prejudiced by the lack of the government witness's address. However, this determination was made without the benefit of *Smith.* Subsequently, the Supreme Court vacated this court's judgment affirming the conviction and remanded to this court to reconsider in light of *Smith.* Significantly, it did not reverse the conviction. *United States* v. *Garafalo,* 390 U.S. 144. Subsequently, this court remanded to the district court to consider this question in a new trial. *United States* v. *Garafalo,* 396 F.2d 952 (7th Cir. 1968). The *Smith* issue was not determined on remand in *Garafalo.*

We see no merit in the following miscellaneous errors asserted. The district court denied Teller's motion for mistrial because of an agent's volunteering—in response to the court's question why informer Washington was kept by the government in a motel—that "we are concerned for his safety." The court gave an adequate instruction to the two-thirds of the jury who heard the statement to disregard it. We think the realistic view is that any error was, as the district judge thought, "harmless." The court struck from the record an obscene statement attributed to Teller in an agent's testimony, and ordered the jury to disregard it. The obscenity itself in today's world could not have seriously shocked the jury or prejudiced Teller's fair trial on the ground that the jury may have inferred Teller was habitually profane. The 1965 license numbers of government automobiles, found in the search of defendant Sullivan's premises and introduced into evidence, were not immaterial to the alleged 1966 offenses. The court properly overruled Teller's objection based on the

best evidence rule to the testimony of the amount of money in excess of $45,000 counted in "two hours" at Teller's residence in execution of the search warrants. We see no reversible error in these rulings singly or together.

We have considered all questions raised and conclude that defendants were convicted in a fair trial.

AFFIRMED.

A true Copy:
Teste:

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Clerk of the United States Court of Appeals for the Seventh Circuit.

APPENDIX B

UNITED STATES COURT OF APPEALS
For the Seventh Circuit
Chicago, Illinois 60604

Friday, June 13, 1969

Before

Hon. ELMER J. SCHNACKENBERG, *Circuit Judge**
Hon. ROGER J. KILEY, *Circuit Judge*
Hon. THOMAS E. FAIRCHILD, *Circuit Judge*

UNITED STATES OF AMERICA, *Plaintiff-Appellee,* vs. SHELDON R. TELLER and JOHN D. SULLIVAN, *Defendants-Appellants.*	Appeal from the United States District Court For the Northern District of Illinois, Eastern Division

No. 16047

This cause came on to be heard on the transcript of the record from the United States District Court for the Northern District of Illinois, Eastern Division, and was argued by counsel.

On consideration whereof, it is ordered and adjudged by this court that the judgment of the said District Court in this cause appealed from be, and the same is hereby, AFFIRMED, with costs, in accordance with the opinion of this Court filed this day.

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* Judge Schnackenberg participated in the hearing of oral argument and the conference of the Judges above-named. He died prior to the issuance of this opinion.

APPENDIX C

UNITED STATES COURT OF APPEALS
For the Seventh Circuit
Chicago, Illinois 60604

Friday, July 7, 1969

Before
Hon. ROGER J. KILEY, *Circuit Judge*
Hon. THOMAS E. FAIRCHILD, *Circuit Judge*

UNITED STATES OF AMERICA, *Plaintiff-Appellee,* vs. SHELDON R. TELLER and JOHN D. SULLIVAN, *Defendants-Appellants.*	Appeal from the United States District Court For the Northern District of Illinois, Eastern Division
No. 16047	

IT IS ORDERED that the petition for rehearing filed by Sheldon R. Teller in the above entitled cause be, and the same is hereby, DENIED.

On consideration of the petition of John D. Sullivan for a rehearing by the Court en banc in the above entitled cause, and, no member of the panel and no judge in regular active service having requested that a vote be taken on the suggestion for an en banc rehearing, and the panel having voted to deny a rehearing,

IT IS ORDERED that the petition of John D. Sullivan for a rehearing in the above entitled cause be, and the same is hereby, DENIED.